therefore obliged to register the plaintiff as owner of the shares, but the above paragraph of the Order of the Court below must be varied to read

.....ordered that the second defendant Company do register the said 200 shares in the name of the plaintiff.

The plaintiff had also asked for an order for payment of the dividends declared by the Company as payable after the date of his purchase of the shares. This claim the learned trial Judge rejected. It was common ground that the plaintiff as beneficial owner must in any event be entitled to these dividends, whether directly or through Ramiah as his trustee. As he is to be registered as a shareholder there is now no objection to his receiving them directly. The paragraph of the Order referring to the dividends should therefore be varied so as to read,

"AND THIS COURT DOTH FURTHER ORDER that the second defendant Company do pay to the plaintiff the amount of all dividends declared by it as payable on or after the 25th day of September 1942 and due in respect of the said 200 shares, in lieu of paying the amount of the same to the first defendant."

As regards costs, the order of the Court below will stand, and the respondent Company must pay to the appellant his costs of this appeal. The appeal should be allowed and judgment entered accordingly.

Pretheroe, Ag. C.J. : — I have had the advantage of reading the judgment of Briggs, J. in this appeal. I agree with the decision at which he has arrived, and have nothing to add thereto. The Order of the Court regarding costs will be that proposed by Briggs, J.

Thomson, J. : — I have had the advantage of reading the Judgment to be delivered by my brother Briggs. I agree with what he says, and I agree that the Order of the Court below should be varied as proposed by him.

I would add that although this is in form an appeal, in substance it is merely a proceeding to rectify the effects of an oversight by all parties in the Court below.

Appeal allowed.

HAJI OSMAN BIN ABU BAKAR v. SAIYED NOOR BIN SAIYED MOHAMED.

[Court of Appeal (Pretheroe, Ag. C.J., Thomson and and Briggs, JJ.) February 2, 1952]

[F.M. — Civil Appeal No. 42 of 1951]

Land — Sale of land — Death of transferor before registration — Land Code, ss. 85(ii) and 155 — Specific performance —Probate Enactment, s. 95(iii).

X for a valuable consideration, executed a transfer of land; the transfer and the document of title to the land were handed to the purchaser. Before the transfer was presented for registration X died and registration was refused under section 85(ii) of the Land Code. A claim for specific performance was refused; the Court of Appeal allowing,

Held, the death of the proprietor — transferor of land did not avoid contract; the legal personal representative of such deceased person was trustee for the purchaser who, subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake, was entitled to the land and to possession.

Held, per Thomson, J., the intention of section 85(ii) of the Land Code is to protect the estate of a deceased person against fraud rather than against fulfilling the lawful and binding obligations of the deceased.

Cases referred to :—

(1) *Loke Yew v. Port Swettenham Rubber Co. Ltd.* (1913) A.C. 491.

(2) *In re T. A. S. Sanmugam Pillay decd.* (1951) M.L.J. 81.

COURT OF APPEAL, setting aside the decision of Hastings, J. reported in (1951) M.L.J. 129.

J. D. M. Donnelly for the appellant.

K. C. Chan for the respondent.

The facts are fully set in the judgment of Hastings, J. in (1951) M.L.J. 129; the arguments appear sufficiently from the judgments *infra.*

Cur: Adv. Vult.

Pretheroe, Ag. C.J. : — In this appeal I have had the advantage of reading the judgments prepared by Thomson and Briggs, JJ. I am in complete agreement with both those judgments but as we are differing from the learned trial Judge and an important point of law is involved I will briefly set out my own views.

In the course of a long and carefully prepared judgment the learned trial Judge gave his reasons for arriving at the decision that when a proprietor enters into a contract to sell land but dies before presentation of the transfer document for registration "the contract" comes "to an end" and the transferee becomes "entitled to recover the money he had paid as on a failure of consideration." With respect I do not agree with this interpretation of sub-section (ii) of section 85 of the Land Code. In my opinion, in the circumstances described, the effect of the sub-section is not to avoid the contract but merely to alter the normal procedure of registration. Section 155 of the Code provides, *inter alia*, that whenever a proprietor dies the proper registering authority shall not register any dealing with the deceased's land "*until* the representative of such proprietor shall have presented a written application to be registered as proprietor." The section then proceeds to describe how the registration shall be effected. As the title registered in the name of the representative is precisely the same as that held by the

deceased proprietor the nature of the former's title in this case must now be ascertained. The learned trial Judge was of opinion that the proprietor was a trustee of the land for the purchaser but only until the possession passed. He then decided that possession passes when the purchaser goes away with the transfer and title in his possession. That is the crucial point of this case and, in my view, cannot be supported. In *Loke Yew v. Port Swettenham Rubber Company Limited*[1] the position is clearly stated. Where a contract for a sale of land has been completed "but the contract is not effective to convey any estate in land unless it is registered" "the effect of the instrument rested in contract until registration." As death does not avoid a contract of this nature it seems clear that the same principles apply where a proprietor dies and his represetative becomes the registered proprietor. As such he can, in my opinion, be compelled to take all steps necessary to give effect to the contract executed by the deceased proprietor.

For these reasons I think this appeal should be allowed and the judgment in the Court below set aside. An order for specific performance of the contract made on the 25th day of September, 1944, between appellant and Saiyed Mahamud bin Saiyed Pandak (deceased) will issue. Appellant will have his costs both in this Court and in the Court below which will be paid out of the estate of the said Saiyed Mahamud (deceased) and the sum of $500 deposited in Court will be paid out to appellant or his solicitor.

Thomson, J. : — This appeal raises a question of law of the very greatest importance to buyers and sellers of land. The facts of the case have never been in any real dispute, and it will only be necessary to recapitulate them here in the very barest outline.

The defendant in the original proceedings and the respondent to this appeal, is the administrator of the estate of one Saiyed Mahamud (to whom I shall henceforth refer as "the vendor") who died on 11th July, 1949. On 25th September, 1944, the vendor sold a piece of land to the present appellant for the sum of $2,250. The purchase price was paid, in Japanese currency, the transfer was executed by both parties before the Collector of Land Revenue and the transfer together with the document of title to the land was handed by the vendor to the appellant. For reasons which are by no means clear but with which I am not concerned at this stage, the transfer was not presented for registration until 25th October, 1949, that is to say, some six months after the death of the vendor and registration was then refused by reason of section 85(ii) of the Land Code which reads as follows :—

> "The death of any person prior to the presentation of any instrument executed by him shall prevail so as to prohibit the registration of such instrument, and such instrument if registered shall be void."

Administration to the estate of the vendor was granted to the present respondent on 28th December, 1949, and after some preliminary correspondence between the solicitors concerned the appellant commenced proceedings against him on 7th October. In these the appellant asked for specific performance of the agreement of 25th September, 1944, whereby the vendor agreed to sell the land to him, together with *mesne* profits down to the date of judgment. In the alternative, he claimed rescission of the contract and return of the purchase price in Malayan currency, but this alternative claim was clearly added only for the sake of form and at all times his real claim was for specific performance. He wanted the land and not his money back.

The defence was that the appellant was not entitled to specific performance but was only entitled to rescission of the contract and refund of the purchase price in Japanese currency revalued in accordance with the Debtor and Creditor Ordinance which with interest amounted in Malayan currency to $243.31, which sum was paid into Court.

So then, when the case came on for trial there was on the face of it one question only to be decided and that was whether the case was one where specific performance should be ordered or whether the defendant was only entitled to rescission of the contract and refund of the purchase money paid revalued in terms of post-war Malayan currency. At the conclusion of the evidence for the plaintiff, however, the learned trial Judge said that, in his opinion, the transfer having been executed and handed to the purchaser together with the documents of title there remained nothing for the vendor to do. After hearing argument by counsel and the defendant having intimated that he did not call any evidence, judgment was reserved. In the event, specific performance was refused and judgment was given for the plaintiff for the revalued amount of the purchase money with costs on the lower court scale up to the time of payment into court and costs to the defendant on the High Court scale as from the date of payment in.

The learned Judge gave his reasons for the course he took in a considered judgment which, quite frankly, I find it somewhat difficult to summarise. I am, however, unfortunately compelled to take a different view of the matter and I shall therefore proceed to

state my own views pausing from time to time to indicate where I differ from His Lordship.

In the first place, I think that the question of whether an action for specific performance would have lain against the vendor at any time prior to his death does not arise. The trial Judge was of the opinion that it would not have lain on the ground that having executed the transfer and handed it to the purchaser together with the documents of title, the vendor had done all he was bound to do. I do not disagree with that opinion but would content myself with observing that I find it difficult to envisage circumstances in which the point would arise, for so long as the vendor of land is alive there is nothing to prevent a purchaser of the land presenting the transfer for registration without any step being taken by the vendor, nor is there anything standing in the way of its registration.

Once, however, the vendor dies then by reason of section 85(ii) of the Land Code, the terms of which have already been quoted, an insuperable obstacle presents itself in the way of the purchaser alone obtaining registration, for by reason of that section the effect of the death of the vendor is to prohibit the registration of the transfer. And be it noted that the terms of that section are just as applicable in a case where death has supervened before it has been physically possible to effect registration as in a case where, as here, there has been substantial delay. The trial Judge found difficulty in arriving at the intention of the Legislature in enacting this section but would seem to have concluded that it was to provide that if the legal personal representative of the deceased was not prepared to take the necessary steps to perfect the title of the purchaser the latter should only be entitled to claim the return of the purchase price. In my opinion that view is not tenable. For one thing, it overlooks the obvious hypothesis that what the Legislature may have intended was a simple safeguard against frauds by ensuring that nothing was done after a vendor's death that might affect his estate without the active concurrence of the legal personal representative being required and for another, it seems to me that in arriving at it His Lordship was unduly influenced by the practical difficulties which might arise in a case where the legal personal representative was an administrator, who, by reason of section 95(iii) of the Probate Enactment, would require to obtain the permission of the Court. So far, however, as the effect of the section is concerned, there can be no difference in principle between an administrator and an executor. To attribute to the section the effects which the trial Judge supposed to flow from it would be to arrive at the position, which to my mind is wholly untenable, that the Legislature intended to put every potential purchaser of land in his enquiry not only as to whether his vendor was likely to survive long enough to enable the transaction to be registered but also as to whether, in the unfortunate event of his not surviving so long, representation of his estate was likely to pass to an administrator or an executor.

I am not unappreciative of the very thorough and persuasive argument which was addressed to us by counsel for the appellant but, in my opinion, and perhaps not unnaturally in view of the fate which overtook him at the trial, he made unnecessarily heavy weather of a matter which is capable of being resolved in a very simple manner without reference to the Australian authorities on the "Torrens" system, whose statutory framework in the Australian States in no case includes the provision with which we are concerned here, and without considering the question of whether any portion of the estate in the purchased land became vested in the legal personal representative on the death of the deceased. I would put the matter thus. If a purchaser agrees to buy a piece of land and pays the purchase price then subject to the terms of the contract and in the absence of fraud, misrepresentation or mistake he is entitled to a good title to the land and to possession, and the death of the vendor does not abate his rights by one iota. To my mind that proposition requires no show of authority to support it and the Courts will be reluctant to impute to the Legislature any intention to detract from it unless expressed in crystal clear terms or by wholly unavoidable force of implication. It is admitted that the only section of the Land Code which has any bearing on the matter is section 85(ii), and I must decline even to consider whether that section was intended in effect to avoid every and any contract for the sale of land where the vendor dies before registration when there is available the simple explanation I have already suggested. In other words, every canon relating to the interpretation of statutes compels me to the view that the intention of the section is to protect the estate of a deceased person against fraud rather than against fulfilling the lawful and binding obligations of the deceased.

To my mind the result at which I have thus arrived concludes the matter. If an order for specific performance is made it will have to be complied with. The difficulties which have been suggested as likely to arise in connection with complying with such an order are, in my opinion largely hypothetical and in

any event it is no part of our business to deal with them before they are brought before us in concrete form. After all, we are not forensic universal providers. It is for the party against whom the order of the Court is made to comply with it and if he finds reasonably substantial obstacles in his way he will at least not be in contempt.

Having thus come to the conclusion that the Court had power to make an order for specific performance, there remains the question whether, had the trial Judge been of that opinion he would have exercised his discretion to do so. For myself, I am unable to discover any reason why he should not have done so. It is true that before us Mr. Chan argued for the respondent that this was not a case where specific performance should be ordered because there had been great delay on the part of the appellant and because so to order would be to cause hardship to the beneficiaries of the estate of the deceased. Neither of these points was pleaded and neither of them was argued at the trial, and I do not think there is substance in either of them. There was certainly delay on the part of the purchaser, but I am not prepared to say that it was wholly unreasonable in the circumstances prevailing in this country during the material years nor can I see how anyone save the purchaser himself who has been out of possession of the land all the time has been in any way prejudiced. Nor can I discover any evidence to support the argument that there is hardship to the beneficiaries of the estate in depriving them of the fruits of being allowed to avoid a bargain made by the deceased in good faith which with the lapse of years has apparantly turned out to be not so good a bargain as was anticipated.

I would allow the appeal and order specific performance as prayed with costs to the appellant both here and in the Court below. These costs should come out of the estate as I see no reason to suppose that the respondent has not acted in good faith in what he has conceived, though mistakenly, to be the interests of the estate.

Briggs, J. : — The facts of this case are fully set out in the judgment of the learned trial Judge and I do not think it necessary to repeat them. The defence called for strict proof of the alleged contract of sale. This was duly forthcoming and the formation of the contract is no longer in issue. The defence further alleged that the plaintiff had made no demand that the defendant should perform the contract. This is true in a very limited sense, in that, when the plaintiff made written demand by letter dated 20th June, 1950, he did so, not to the defendant in his capacity as administrator, but to the defendant personally and other beneficiaries. He thought that there was then no personal representative of the estate of the transferor, and indicated his own intention to take letters of administration. However, the defendant had obtained a grant and at once contested the validity of the sale. In the circumstances no further demand was necessary. The defence further contended that the plaintiff was not entitled to any of the relief claimed. This was probably sufficient to cover the points of law raised at the trial and forming the main subject matter of this appeal.

I will deal first with two minor points. Mr. Chan, for the respondent, contended that, if the contract was subsisting, the Court should still not grant specific performance, on the grounds of delay amounting to laches and of hardship. The delay in presenting the transfer was certainly considerable and, if it had operated in any way so as to prejudice the estate of the transferor, the Court would be obliged to look very closely into the reasons for delay and to decide whether the delay was in the circumstances excessive. It is not, however, suggested that any deteriment has arisen from the delay and, that being so, I see no reason why it should bar the plaintiff's claim. Merely to have to sign another transfer is not to suffer detriment in this sense. As regards hardship, there was some evidence at least of undervalue; but this alone does not constitute hardship which will cause the Court to refuse specific performance. There must be some unfair or unequal dealing in addition. See *Fry on Specific Performance,* 6th edition, pp. 209 — 212. I think there is no substance in either of these defences. I also think that if hardship is relied on in a case of this kind, it is desirable that it should be pleaded with particulars of the facts relied upon.

The main issue on this appeal arises from the learned trial Judge's decision that the effect of section 85 (ii) of the Land Code was to avoid the contract of sale and to leave the plaintiff without remedy save that of obtaining a refund of the purchase price. This is a somewhat startling proposition. The point appears to have been taken by the learned Judge himself, and not in the first instance by Counsel for the defendant, though he later adopted it. So far as I am aware, it has never before been suggested, in Court or elsewhere, since the Land Code came into force, that the sub-section had that effect. It is all the more necessary that the point should be carefully examined.

It is common ground that in most, if not all, jurisdictions where the Torrens System, or a variant of

it, applies, the personal representative must perform a contract of sale of land made by the deceased. But section 85(ii) is peculiar to the Federation and is not to be found in any other Code. For this reason the learned trial Judge held, and I think rightly, that the passages from *Hogg, Wiseman & Kerr* cited by Mr. Donnelly cannot be conclusive on this question. I would make the same comment on the passage from *Moses* which he cited to us. The statutes with which those authors dealt are not *in pari materia* with ours.

The learned trial Judge was much influenced by two considerations, first, that an administrator in this country cannot transfer land without leave of the Court, that this is a provision of law enacted for the protection of the beneficiaries of the estate, and that in many cases (and certainly in this one) the performance of the contract will not be in the interest of the beneficiaries; secondly, that he could see no useful purpose which the sub-section served unless it was to avoid the contract, or at least to give a loophole by means of which the administrator might lawfully refuse to perform it. I think neither of these points really supports his conclusions. As a general rule, a personal representative is obliged to honour all obligations lawfully entered into by the deceased to the full extent of his estate, regardless of the fact that each debt paid and each disadvantageous contract performed, or cancelled for proper compensation, *pro tanto* diminishes the estate and "harms" the beneficiaries. The question of their "benefit" cannot arise in connection with lawful obligations to third parties, strangers to the estate. It would require the very clearest words to satisfy me that the legislature had intended to depart from this fundamental rule. In the case of a contract to sell land which should on general grounds be performed, the Court's leave is, and must be, given as a matter of course and of justice to the purchaser. If the administrator refuses to apply for leave, the Court can and will give leave, and indeed order him, to transfer in an action for specific performance. The beneficiaries need not be parties; he represents their interests *vis a vis* any stranger. There is no necessity in ordinary cases, as the learned Judge thought, to order the administrator to apply to the Court for leave: but this can be, and has been, done in special cases where the beneficiaries ought to be heard. In such a case the purchaser may be a party to the application. Alternatively, a representative beneficiary can be joined in the action for specific performance. It has been held that a purchaser of land seeking to obtain a formal transfer is a "creditor" of the estate, so as to be able to obtain a grant of letters of administration. — *In re T. A. S. Sanmugam Pillay decd.*[2]. That decision, with which I agree, is not consistent with the view of the law taken by the learned trial Judge in this case. Taylor, J. clearly had in mind the performance of the contract, not a mere refund of the purchase money.

Sub-section (ii) of section 85 serves several very useful purposes apart from that suggested by the learned trial Judge. Stale transactions are a considerable danger to the efficiency and smooth working of our system of land law. Far too many actions are brought in which an executory contract made ten, twenty or thirty years ago is relied on. This sub-section at least ensures that a purchaser cannot take a transfer, leave it unregistered until all who could give evidence about it are dead, and then have it registered without any enquiry. It is a useful part of the machinery to prevent secret conveyancing. It ensures that, in any case within its terms, because a new transfer has to be executed and leave of the Court may have to be obtained, the transaction will be subject to proper scrutiny and any forgery or other irregularity is likely to be brought to light. The policy adverse to *old* transfers is seen by contrasting the two sub-sections of section 85. If the transfer is presented promptly, sub-section (i) is more likely to apply than sub-section (ii).

When those two objections are disposed of, I see no other reason for holding that the contract is avoided by the death of the vendor prior to transfer. I agree that the special factors arising from the Japanese occupation do not affect this question in any way. I think the argument from the terms of section 11 of the Specific Relief Ordinance is without validit, The terms of the actual contract have to be inferred from the execution and wording of the transfer. I have no doubt whatever that they include an agreement to take such steps as are in all the circumstances reasonable to assist the plaintiff to vest in himself the registered title to the land. Various special circumstances may dictate special measures under this implied agreement. The death of the vendor is one. To hold, as the learned trial Judge did, that to execute a transfer then valid and registrable, to hand over the title and to give possession, is to perform fully one's obligations under the contract is in my opinion to take an unnatural and formalistic view of the real nature of the contract. If the transfer, through an adventitious circumstance not anticipated by either party, becomes unfit for registration, how can it be said that the vendor has fully performed his contract? Equity looks to the substance, not the form. In support of the view I have put forward, Mr. Donnelly prays in

aid, legitimately, as I think, the terms of section 110 of the Land Code. I think that section shows that there is at least some positive duty in the transferor to assist the transferee to effect registration, if necessary. In this case the transferor, through no fault of his own, was unable to perform that duty. It may be going too far to suggest that section 110 creates an implied "covenant for further assurance"; but I think its effect is analogous to that. Suppose that after execution a transfer were accidentally lost or destroyed before presentation. It is obvious that the Court would order the vendor to execute a second transfer. I think it must now order his personal representative to transfer in the same way. It has never been doubted that, if the contract to sell remains purely executory at the death of the vendor, his personal representative will be ordered to perform it. I can see no reason why the purchaser should be in a worse position, if matters have gone somewhat further and a transfer has been executed, but not presented, at the time of the death.

Finally, Mr. Donnelly, relies on an argument which appears wholly conclusive, that the vendor, and so, under section 158 of the Land Code, his personal representative, held and holds as trustee for the purchaser. I think this principle is stated in its simplest form in *Underhill on the Law of Trusts*, 9th edition, page 188, Art. 32, as follows :—

> "In every case (not coming within the scope of any of the preceding articles) where the person in whom real or personal property is vested has not the whole equitable interest therein, he is pro tanto a trustee of that property for the persons having such equitable interests."

The learned trial Judge held that the trust in favour of the purchaser in whom the title has not yet vested subsists only until possession passes. This is wholly contrary to the general principle. No authority was cited to support it, and I think it is sufficiently disproved, if disproof is needed, by the decision in *Loke Yew v. Port Swettenham Rubber Co. Ltd.*[1]. I think the general principle applies in the fullest sense to this case, and I have no doubt that the respondent as administrator is a bare trustee of this land for the appellant.

For these reasons I think the appeal should be allowed, the judgment of the learned trial Judge should be set aside, an order for specific performance of the conract in the usual terms should be made, and the respondent should pay the costs of the appellant here and below out of the assets of the estate of the deceased come to his hands, or in default of such assets, personally. The deposit of $500 should be paid to the appellant's solicitors.

Appeal allowed.

ONG HAY v. LYE CHIN LOY.

[Orig. Civ. Juris. (Taylor, J.) February 4, 1952]

[Kuala Lumpur — Civil Suit No. 179 of 1951]

Land — Ejectment and trespass — Damages — Remoteness.

The plaintiff desired to build on a vacant land which the defendant rented for storage. The plaintiff gave him notice to vacate but the defendant did not vacate. The plaintiff claimed damages for trespass; he also claimed damages based on the increased cost of building. The defendant contended that the damages had not actually resulted; they were future and problematic and were too remote, not flowing as a direct consequence of the trespass.

Held, the damages based on an increased cost of building had not been actually sustained and might not be sustained and the rise was not in any sense caused by the delay due to defendant's trespass. But had the defendant not delayed building operations the houses could have been completed and could have been let; the plaintiff, then, had lost rent and the defendant was liable for such loss and for damages for the trespass.

ACTION FOR DAMAGES.

H. Y. Teh for the plaintiff.

J. S. H. Skrine for the defendant.

The facts appear sufficiently from the judgment.

Cur. Adv. Vult.

Taylor, J. : — This is an action for ejectment and damages for trespass to land. Some of the points in controversy were settled or abandoned at the hearing and the only question remaining is the amount of damages. For this purpose the facts may be condensed.

The plaintiff has recently purchased four vacant shop lots on which he wishes to build.

The defendant is the lessee of neighbouring land on which he has a factory for precasting concrete blocks. He had rented the vacant shop lots from the plaintiff's vendor, as storage space for his materials. The plaintiff gave him notice to vacate, warning him that he was ready to commence building. The defendant has not yet vacated the land and continues to be a trespasser thereon.

The cost of building has greatly increased since the date when the plaintiff was ready to commence and he contends that the measure of the damages is the measure of this increase.

The defendant contends that these damages have not actually resulted, that they are future and problematical, and also that they are not a direct consequence of the defendant's trespass and are too remote.

If the plaintiff had actually entered into a contract, his building contractor would not have been able to proceed and the plaintiff would have become liable to him either for a substantial sum by way of